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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 781

W. G. DUNCAN,
Transferee of San Antonio Driverless Co., Inc.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above-entitled cause on March 19, 1949, affirming the decision of the Tax Court of the United States entered on December 23, 1947.

OPINIONS BELOW

The opinion of the Tax Court (R. 38-41) is not reported. The opinion of the Circuit Court of Appeals (R. 87-88) is reported in..... F. (2d).....

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 19, 1949. (R. 89). The jurisdiction of this Court is invoked under Section 1254 (1), Title 28, United States Code, Judiciary and Judicial procedure and under Supreme Court Rule No. 38, Sec. 5.

QUESTION PRESENTED

The only question presented in this case is whether petitioner's evidence was sufficient to sustain a finding contrary to the Commissioner's determination.

STATUTES INVOLVED

There is no controversy involving the construction or application of any statute.

STATEMENT OF FACTS

The facts, as proved in the Tax Court, (R. 50-81), may be summarized as follows:

The petitioner is an individual with residence in San Antonio, Texas. (R. 34).

The San Antonio Driverless Co., Inc., now dissolved, had its principal office at San Antonio, Texas and filed its income tax, excess profits tax and declared value excess profits tax returns for 1943 with the Collector for the First District of Texas. (R. 34).

In September of 1940, petitioner and Frank Manley formed a partnership known as the Texas Driverless Company for the operation of a driverless automobile business. (R. 34, 35, 51). This patnership operated the

driverless automobile business until March 1, 1943, at which time the petitioner purchased Manley's interest in the partnership. (R. 52, 53, 54). Petitioner operated the driverless automobile business from March 1, 1943, until sometime during 1945, when he discontinued such business. (R. 54).

Due to the fact that petitioner previously had been engaged in a very hazardous business and had several damage suits pending against him, his wife, Manley and another organized the San Antonio Driverless Co., a corporation, in December of 1940. (R. 51). Petitioner's motive in having his wife and others organize the corporation was to have the corporation acquire title to the automobiles used in the partnership business as a possible protection against seizure by his judgment creditors. (R. 51, 65).

After the San Antonio Driverless Co. was incorporated the partnership transferred its automobiles to the corporation but continued to operate the business. (R. 52). The corporation and partnership entered into a written agreement whereby the corporation rented the automobiles to the partnership for two dollars per day for each automobile. (R. 52, 71-76). Said contract further provided that the corporation, in order to secure the rentals therein provided for, should have the right to take the daily revenues, keeping same and accounting to the partnership at the end of each month. (R. 74).

The corporation never operated the driverless automobile business. (R. 52, 53).

All the receipts were deposited in the name of the corporation and all disbursements were made by checks drawn on th corporation's bank account. (R. 56, 59).

Records of all cash receipts and disbursements were kept, but there was no attempt to segregate the corporation

transactions from the partnership transactions on the books. (R. 60, 61, 67).

The corporation filed income tax returns for 1941, 1942 and 1943. The partnership filed a return for 1942, but none for 1941 and 1943. (R. 37). The record does not show whether a partnership return was filed for the year 1940. No partnership return was filed for the year 1943 because in January of 1944 a revenue agent advised that all 1943 income had to be reported by the corporation. (R. 37).

It was stipulated by counsel that the amount of net income as computed by the revenue agent was correct and that the issue in controversy was whether it should be allocated to the partnership or the corporation. (R. 66).

Walter R. Flack, a certified public accountant, prepared a profit and loss statement for the corporation for the year 1943. (R. 68, 69), and respondent's counsel admitted that the correctness of the computation was not in controversy. (R. 70).

The Commissioner of Internal Revenue held that the business was operated by the corporation and the Tax Court held that petitioner's evidence was not sufficient to overcome the presumption of correctness of the Commissioner's determination. (R. 39).

The Circuit Court of Appeals affirmed, holding that taxpayer did not overcome the presumptive correctness of the Commissioner's determination. (R. 87-88).

REASONS WHY WRIT SHOULD BE GRANTED

The petitioner testified that the Driverless automobile business was operated by the Texas Driverless Company, a partnership, from September of 1940 until March 1, 1943, and an individually owned business thereafter. Petitioner's testimony was corroborated both by documen-

tary evidence and the testimony of his attorney. The respondent did not rebut petitioner's evidence.

The holding that petitioner did not overcome the presumptive correctness of the Commissioner's determination is in direct conflict with the holding of the Tenth Circuit Court of Appeals in *Crude Oil Corporaion of America* v. *Commissioner*, 161 F. (2d) 809, in which case the court said:

> "The presumption of the correctness of the Commissioner's finding is one of law. It is not an inference of fact. It disappears when evidence, sufficient to sustain a contrary finding, has been introduced."

Other decisions to the same effect are: *Hemphill Schools* v. *Commissioner*, 132 F. (2d) 961; *Wiget* v. *Becker*, 84 F. (2d) 706; *Lawrence* v. *Commissioner*, 143 F. (2d) 456; *J. M. Perry & Co.* v. *Commissioner*, 120 F. (2d) 123; *E. Albrecht & Son* v. *Landry*, 114 F. (2d) 202; *Andrews* v. *Commissioner*, 135 F. (2d) 314.

The holding in the instant case is also in direct conflict with the Fifth Circuit Court of Appeals' own holding in *Foran* v. *Commissioner*, 165 F. (2d) 705, in which case the court held that the Tax Court committed an error or law in disregarding the testimony of the petitioner.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari issue out of and under the seal of this Honorable Court directed to the Fifth Circuit Court of Appeals commanding that court to certify and send to this Court for its review and determination a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals. Fifth Circuit, had in the case numbered and entitled on its docket No. 12,422, styled W. G. DUNCAN, TRANSFEREE OF SAN ANTONIO DRIVERLESS CO., INC.,

PETITIONER, v. COMMISSIONER OF INTERNAL REVENUE, RESPONDENT, to the end that this case may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgments of the Tax Court of the United States and of the United States Circuit Court of Appeals for the Fifth Circuit be reversed with appropriate directions by this Court, and for such further relief as to this Court may seem proper.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Tax Court of the United States (R. 38-41) is not reported. The opinion of the Circuit Court of Appeals (R. 87-88) is reported in_____ F. (2d) _____.

JURISDICTION

This has been stated in the preceding Petition for Writ of Certiorari, to which reference is here made, and, therefore, will not be repeated here.

QUESTIONS PRESENTED

The only question presented in this case is whether petitioner's evidence was sufficient to sustain a finding contrary to the Commissioner's determination.

STATUTES INVOLVED

There is no controversy involving the construction or application of any statute.

STATEMENT OF THE CASE

The statement of facts has been set out in the preceding Petition for Writ of Certiorari, on pages 2 to 4, inclusive, which is hereby adopted and made a part of this brief.

SPECIFICATION OF ERROR

Both the Tax Court and the Circuit Court of Appeals erred as a matter of law in holding that petitioner's evidence was insufficient to overcome the presumptive correctness of the Commissioner's determination.

ARGUMENT

I

The evidence introduced by petitioner was sufficient to sustain a finding that the driverless automobile business was operated by the Texas Driverless Company.

The petitioner testified that he and one Frank Manley formed a partnership in September of 1940 for the purpose of operating a driverless automobile business, and that the said partnership operated the business until he purchased Manley's interest in the partnership and in the San Antonio Driverless Co., Inc., a corporation, on March 1, 1943. That thereafter he operated the business under the trade name of the Texas Driverless Company. He further testified that the San Antonio Driverless Co., Inc., was organized in December of 1940 for the sole purpose of holding title to the automobiles being used in the business. His testimony was corroborated by invoices and bills, by the testimony of his attorney, and by the lease agreement between the San Antonio Driverless Co., Inc., and

the Texas Driverless Co. to such an extent that the Tax Court found as a fact that there was no change in the method of operating the business after the corporation was formed. (R. 35-36).

The respondent produced no evidence that the corporation operated the business. It is true that the corporation originally reported the income from the 1943 operation of the business after its bookkeeper was told by an internal revenue agent that it had to do so, but that fact does not rebut the positive and unimpeached testimony of petitioner and his attorney that the corporation did not operate the driverless automobile business.

It is respectfully submitted that if the Tax Court had found as a fact that the driverless automobile business was operated by the Texas Driverlss Company, there is nothing in the record that would sustain a reversal by a reviewing court. In other words, the evidence was sufficient to sustain a finding contrary to the Commissioner's determination. This being the case, the presumption of correctness of the Commissioner's determination, being one of law and not of fact, disappeared. In *Crude Oil Corporation of America* v. *Commissioner*, 161 F. (2d) 809, the Court said:

> "The presumption of the correctness of the Commissioner's finding is one of law. It is not an inference of fact. It disappears when evidence, sufficient to sustain a contrary finding, has been introduced."

The Tax Court and the Fifth Circuit Court of Appeals held that petitioner's evidence was insufficient to overcome the presumption of correctness of the Commissioner's determination. Obviously, they fell into the error of assuming that the presumption of correctness of the Commissioner's determination is an inference of fact, whereas it is a presumption of law.

II.

The Tax Court and the Fifth Circuit Court of Appeals erred as a matter of law in disregarding the evidence of petitioner.

Due, perhaps, to the injection in the record of a lot of immaterial matter, such as the failure of the partnership to keep adequate records, etc., the Tax Court and the Circuit Court of Appeals disregarded petitioner's positive, corroborated and unimpeached evidence to the effect that the Texas Driverless Co. and not the San Antonio Driverless Co., Inc., operated the driverless automobile business during the year 1943. In doing so, they erred as a matter of law. *Foran* v. *Commissioner*, 165 F. (2d) 705.

CONCLUSION

It is respectfully submitted that the writ should be granted.

Respectfully submitted,
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